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**BEFORE THE
UNITED STATES DEPARTMENT OF TRANSPORTATION
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION
OFFICE OF CHIEF COUNSEL**

DEPT. OF TRANSPORTATION
DOCKETS

2005 MAR 11 P 2: 12

In the Matter of:

Colorfast Industries

Respondent.

**PHMSA Case No. 04-218-SB-SW
DMS Docket No. PHMSA-2006-24207-1**

ORDER OF THE CHIEF COUNSEL

This matter is before the Chief Counsel of the Pipeline and Hazardous Materials Safety Administration (PHMSA) for a determination regarding the Research and Special Programs Administration's (RSPA)¹ Notice of Probable Violation (Notice), issued to Colorfast Industries (Respondent) on March 12, 2004. The Notice formally initiated proceedings against Respondent for violations of the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171-180. The Notice advised Respondent that PHMSA proposed to assess a civil penalty in the amount of \$17,540 for the following five violations of the HMR:

Violation 1: Offering a hazardous material for transportation in commerce in unauthorized, non-UN standard packagings, when specification packaging was required, in violation of 49 C.F.R. §§ 171.2(a), 173.22(a)(2), 173.24(c) and 173.202(a).

Violation 2: Offering a hazardous material for transportation in commerce when while failing to execute a proper document for shipment of hazardous materials, in violation of 49 C.F.R. §§ 171.2(a), 172.200(a), 172.201(d), 172.202 and 172.204(a).

¹ This case, however, is no longer before RSPA for decision. Effective February 20, 2005, the Pipeline and Hazardous Materials Safety Administration (PHMSA) was created to further the highest degree of safety in pipeline and hazardous materials transportation. See Section 108 of the Norman Y. Mineta Research and Special Programs Improvement Act (Public Law 108-426, 118 Stat. 2423-2429 (November 30, 2004)); see also 70 Fed. Reg. 8299 (February 18, 2005) (redelegating the hazardous materials safety functions to the Administrator, PHMSA). For ease of reading and clarity, when an action occurred at RSPA this order will refer to PHMSA.

Violation 3: Offering a hazardous material for transportation in commerce while failing to mark the packagings with the proper shipping name and identification number of the hazardous material, in violation of 49 C.F.R. §§ 171.2(a), 172.300(a), and 172.301(a).

Violation 4: Offering a hazardous material for transportation in commerce that was packaged in a UN standard marked and certified packaging that had not been closed in accordance with the manufacturer's closure instructions, in violation of 49 C.F.R. §§ 171.2(a), (e); 173.22(a)(4); and 173.24(f)(2).

Violation 5: Offering hazardous materials for transportation in commerce while failing to provide each hazmat employee general awareness/familiarization, function-specific, and safety training, in violation of 49 C.F.R. §§ 171.2(a), 172.702(b), and 172.704(a).

Background

As an initial matter, PHMSA must consider whether Respondent's business activities bring Respondent within the jurisdiction of this agency. As a function of its business, Colorfast Industries manufactures hazardous materials – industrial laundry and dry cleaning chemicals – which it sells and offers for transportation in the United States. Therefore, Respondent is subject to the jurisdiction of the Secretary of Transportation, PHMSA's Associate Administrator for Hazardous Materials Safety, and PHMSA's Office of Chief Counsel.²

A. Inspection

On December 10, 2003, an inspector from the Office of Hazardous Materials Enforcement conducted a compliance inspection at Colorfast Industries in Dallas, Texas. Mr. Sergio dosSantos, President, represented the company during the inspection and provided requested documents.

The inspector observed and photographed non-UN standard boxes bearing corrosive labels and marked, in part, "Boiler-Pro" and "Caution: Corrosive. Contains Sodium Hydroxide, Sodium sulfite, Morpholine." The boxes each contained four one-gallon non-UN standard plastic bottles. The Material Safety Data Sheet (MSDS) for Boiler-Pro identified the chemical

² See 49 U.S.C. § 5103 (2005); 49 C.F.R. § 107.301 (2004).

family as "Cleaning Compounds," the DOT class as "Non-Flammable, Corrosive Liquid," and the hazardous ingredients as "Potassium Hydroxide, Sodium carbonate, and Morpholine." Respondent provided the inspector with a sample of Boiler-Pro for corrosivity testing. The PHMSA contracted product testing laboratory reported that Boiler-Pro is a PG II corrosive material.

At Respondent's facilities, the inspector also observed and photographed five-gallon, UN standard marked and certified jerricans bearing corrosive labels and marked, in part, "UN 3H1/Y1.8/100/03/USA/+AA0762." Respondent told the inspector that its employees close the jerricans hand-tight and not to any specific torque. At the inspector's request, Respondent obtained a copy of the manufacturer's closure instructions for the observed jerricans. The instructions indicate that a torque wrench is needed to properly close the jerricans. The inspector called the jerrican manufacturer and confirmed that the manufacturer had provided a copy of its closure instructions to Respondent earlier in the year.

Respondent provided the inspector with shipping papers for three shipments of Boiler Pro. The shipments were made by common carrier. Respondent stated that only the bill of lading and the invoice accompanied the shipment; no other shipping papers were provided to the carrier. None of the papers Respondent provided to the inspector had either an emergency response phone number or a shipper's certification statement.

- Shipment 1 – three (3) boxes, each containing four (4) one-gallon non-UN standard plastic bottles containing Boiler-Pro
Bill of lading, dated August, 30, 2003, identified product as "Laundry products non-regulated"
Invoice number 1379, dated September 2, 2003, identified product as "Boiler Pro –boiler treatment"
Respondent indicated the boxes were marked the same as those seen by the inspector at Respondent's facilities.

- Shipment 2 – four (4) five-gallon jerricans containing Boiler-Pro
Bill of lading, dated August, 30, 2003, identified product as “Laundry products non-regulated”
Invoice number 1379, dated September 2, 2003, identified product as “Boiler Pro –boiler treatment”
- Shipment 3 – two (2) five-gallon jerricans containing Boiler Pro
Bill of lading, dated September 30, 2003, identified product as “Laundry products”
Invoice number 1402, dated September 30, 2003, identified product as Boiler Pro –boiler treatment”

The inspector requested hazardous materials training documents for Respondent’s hazmat employees. Respondent was not aware of the requirement for hazardous materials training and was not able to produce any records showing its employees had received general/awareness, function-specific or safety training.

At the end of the inspection, the inspector conducted an exit briefing with Respondent and explained the probable violations. Violation 1 was cited as a quality control item at the initial exit briefing, pending testing of the sample of Boiler-Pro provided by Respondent. On January 12, 2004, the inspector prepared a revised Exit Briefing, citing improper packaging of a PG II corrosive material as a probable violation. Although Respondent did not return a signed copy of the revised Exit Briefing, Respondent confirmed by telephone with the inspector that it had received the revised Exit Briefing.

B. Correspondence

In response to the exit briefing, Respondent sent a letter on January 28, 2004, documenting corrective actions taken. Respondent provided a copy of the new label for Boiler-Pro, which included the UN identification number 1814 (potassium hydroxide, solution) and the shipping description “CORROSIVE LIQUID NOS (Contains Potassium Hydroxide).Packing Group II.” [sic] Respondent provided evidence of having purchased UN-approved gallon containers with child-resistant caps. Respondent also provided a copy of a receipt for the

purchase of a torque wrench for proper closure of the five-gallon jerricans, and a copy of the receipt for the purchase of cd-rom training materials for its employees. Respondent also provided a copy of a recent bill of lading, which described the hazardous material as “Boilerpro Corrosive Liquid NOS Contains: Caustic Potasa.”

C. Notice of Probable Violation

On March 12, 2004, the Office of Chief Counsel issued a Notice of Probable Violation (Notice) to Respondent, proposing a civil penalty in the amount of \$17,540 for the five violations of the HMR. PHMSA used the Penalty Guidelines set forth at Appendix A to 49 C.F.R. Part 107, subpart D, in calculating the civil penalty proposed in the Notice. The proposed penalty included a \$2,160 reduction for corrective actions taken by Respondent.

D. Informal Response

On March 30, 2004, Respondent submitted an informal response to the Notice, stating the company was experiencing serious financial difficulties. Respondent provided financial information to demonstrate its inability to pay the propose penalty. Following a telephone conversation with the Office of Chief Counsel on April 14, 2004, Respondent submitted a letter dated April 20, 2004. With the letter, Respondent enclosed additional evidence of corrective action to address deficiencies in its original submission.

Respondent submitted a new label for Boiler-Pro with the correct UN number, a sample of the corrected bill of lading, copies of the monthly training meeting agendas, and additional financial information. The new Boiler-Pro label listed the UN number 1760, the corrective identification number for the proper shipping name “corrosive liquid, n.o.s.” The new bill of lading listed an emergency response telephone number but did not have a shipper’s certification statement. The shipping description on the bill of lading was “Corrosive Liquid, NOS (Contains

Potassium Hydroxide) PG II, UN 1760.” The monthly training meeting agendas Respondent submitted are identical (except for the dates). The topics emphasize safety but also include some information regarding proper packaging.

In a letter dated April 20, 2004,³ Respondent again emphasized its serious financial condition and requested a settlement. On October 21, 2005, the Office of Chief Counsel replied to Respondent’s letter but never received any further correspondence.

Discussion

Violation 1:

The inspector observed and photographed unauthorized combination packages containing a packing group II hazardous material. The combination packaging was comprised of non-UN standard plastic bottles in non-UN standard boxes. The HMR specifies the types of packagings authorized for packagings based upon the danger posed by a hazardous material. Respondent packaged a packing group II material in a combination packaging that was not on the list of authorized packagings. Respondent did not contest the allegation that it had shipped a packing group II material in an unauthorized container.

Violation 2:

The HMR require shipments of hazardous materials to be accompanied by shipping papers. Those shipping papers are required to provide information about the hazardous materials, a shipper’s certification statement and an emergency response telephone number. The documents in the case file provided by Respondent show that Respondent did not provide the proper shipping name, the hazard class, the UN identification number or the packing group on the papers accompanying the shipments. Furthermore, the papers accompanying the shipments

³ The Office of Chief Counsel received the letter May 13, 2004. The letter was written in response to a letter from the Office of Chief Counsel, dated May 3, 2004.

did not have the required shipper's certification statement or an emergency response telephone number.

Violation 3:

The HMR require non-bulk packagings containing hazardous materials to be marked with the proper shipping name and identification number. The photographs taken by the inspector clearly show the Boiler-Pro labels in use at the time of the inspection did not list the proper shipping name or the appropriate identification number.

Violation 4:

In addition to requiring particular types of packagings, the HMR require packagings to be closed in accordance with the manufacturer's instructions. Failure to close a packaging as instructed compromises the integrity of the packaging, rendering it less safe than it has been certified to be. The Notice alleged Respondent failed to close UN-approved packagings in accordance with the manufacturer's instructions. Respondent did not contest that allegation in the Notice and provided evidence of purchasing a torque wrench.

Violation 5:

The HMR require all employees who directly affect hazardous materials transportation safety to receive hazardous materials training in the areas: general awareness/familiarization with the HMR, function-specific training, safety training, and security awareness training.⁴ Respondent could provide no evidence of any hazmat employees having received any hazardous materials training and did not contest the violation cited in the Notice.

⁴ The requirement for security awareness training was relatively new at the time of the inspection; therefore, Respondent's lack of security awareness training for its employees was cited as a quality control item. All hazmat employees must receive security awareness training, absolutely no later than March 24, 2006.

Findings

Based on the facts detailed above, I find there is sufficient evidence to support a finding that Respondent knowingly violated the HMR as set forth in the opening to this Order. In reaching this conclusion, I have reviewed the inspector's Inspection/Investigation Report and accompanying exhibits, the exit briefing, Respondent's replies, and all other correspondence in the case file. In particular, I note that Respondent did not challenge any of the factual allegations underlying the violations.

Corrective Action

The civil penalty proposed in the Notice was adjusted to reflect corrective actions taken prior to the issuance of the Notice. Since that time, Respondent has submitted additional evidence of corrective action.⁵ Respondent provided evidence that it has obtained new packagings to replace the unauthorized combination packagings it was using. Therefore, the penalty for violation 1 is reduced by twenty percent (20%). Because the information provided by Respondent was not sufficient to determine that the packagings purchased meet the requirements of the HMR, the maximum reduction for corrective action (25%) is not warranted.

Although Respondent provided a sample shipping paper, the sample is not in full compliance with the HMR. The sample shipping paper does not have a shipper's certification statement. The sample shipping paper also does not have a correct basic description. The basic description should be: proper shipping name, hazard class, identification number, packing group. Respondent's sample has the items in the basic description out of order and does not list a hazard class at all. The sample shipping paper produced by Respondent is an improvement over those

⁵ All reductions for corrective action are based on the original baseline penalty, not the amount proposed in the Notice, which may have already been reduced from the baseline.

produced at the time of the inspection; therefore, a ten percent (10%) reduction in the civil penalty is warranted.

The most recent label Respondent submitted appears to provide the information required by the HMR. Respondent also demonstrated that it had obtained a torque wrench, stated it was now using the torque wrench to properly close UN-standard packagings, and indicated in its training records that hazmat employees were instructed in the proper use of the new tool. Therefore, a twenty-five percent (25%) reduction in the penalties for violations 3 and 4 is warranted.

Respondent provided documentation of some hazardous materials training for its hazmat employees. The Notice reduced the penalty five percent (5%) from the baseline. No additional mitigation is warranted. Although Respondent has produced some training records, the purpose of training is to ensure the safe transportation of hazardous materials. Respondent's continued inability to correct its shipping papers and labels indicates that insufficient training has been provided. Although I commend Respondent for what appears to be extensive training in safe *handling* of hazardous materials, PHMSA is concerned with the safe *transportation* of the hazardous materials, which includes ensuring that the materials are safely packaged and are clearly identified (through markings on the packagings and through the description on the shipping paper) in the event of an accident. Respondent should obtain additional instruction in the basic requirements of the HMR.⁶

Conclusion

Based on my review of the record, I have determined that Respondent committed five violations of the HMR as detailed in the opening section of this Order. The baseline penalty for

⁶ Although Respondent provided evidence of purchasing the Hazardous Materials Transportation Training Modules on cd-rom, Respondent did not provide any evidence of having actually studied those materials.

the five violations is \$19,700. After mitigation for corrective action, the penalty is allocated as follows:

Violation No. 1: \$5,600, reduced from \$5,950 in the Notice;
Violation No. 2: \$4,050, reduced from \$4,275 in the Notice;
Violation No. 3: \$3,375, reduced from \$4,050 in the Notice;
Violation No. 4: \$1,875, reduced from \$2,125 in the Notice; and
Violation No. 5: \$1,140, as proposed in the Notice.

Respondent is a small business and has provided extensive evidence that the proposed penalty will affect its ability to continue to do business and that it is unable to pay the proposed penalty. In consideration of Respondent's poor financial condition, an additional reduction of thirty-five percent (35%) is necessary to help mitigate the hardship the civil penalty will cause.

In assessing this civil penalty, I have taken into account the following statutory criteria (49 U.S.C. § 5123(c) and 49 C.F.R. § 107.331):

1. The nature, circumstances, extent, and gravity of the violations;
2. with respect to the Respondent, its degree of culpability, any history of prior violations, its ability to pay, and any effect on its ability to continue to do business; and
3. other matters as justice may require.

Accordingly, under the authority of 49 U.S.C. § 5123 and 49 C.F.R. §§ 107.317 and 107.329, I assess a total civil penalty of \$10,426 for the five violations of the HMR. Respondent may pay this penalty in eight monthly installments of \$1,159 and one final monthly payment of \$1,154.

Payment and Appeal

Respondent must either pay the civil penalty in accordance with the attached instructions (Addendum A), or appeal this Order to PHMSA's Administrator. If Respondent chooses to appeal this Order, it must do so in accordance with 49 C.F.R. § 107.325.⁷

This Order constitutes written notification of these procedural rights.

3/15/06
Date

Joseph Ahern
Joseph Ahern
Acting Chief Counsel

Enclosure

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

⁷ The requirements of § 107.325 include the following: (1) File a written appeal within twenty (20) days of receiving this Order (filing effective upon *receipt* by PHMSA); (2) address the appeal to the Administrator, Pipeline and Hazardous Materials Safety Administration, 400 Seventh Street, S.W., Washington, DC 20590-0001; and (3) state with particularity in the appeal (a) the findings in the Order that are challenged; and (b) all arguments for setting aside any of the findings in the Order or reducing the penalty assessed in the Order. The appeal must include all relevant information or documentation. *See* 49 C.F.R. § 107.325(c)(2). PHMSA will not consider any arguments or information not submitted in or with the written appeal. PHMSA will regard as untimely any appeal that is received after the twenty (20) day period, and it will not consider the request; therefore, PHMSA recommends the use of fax (202.366.7041) or an overnight service as documents received late will not be accepted.

CERTIFICATE OF SERVICE

This is to certify that on the 16th day of March, 2006, the Undersigned served in the following manner the designated copies of this Order with attached addendums to each party listed below:

Colorfast Industries
8266 Moberly Lane
Dallas, TX 75227
ATTN: Mr. Sergio dosSantos

Original Order with Enclosures
Certified Mail – Return Receipt

Mr. Doug Smith
Office of Hazardous Materials Enforcement
Washington, D.C. 20590

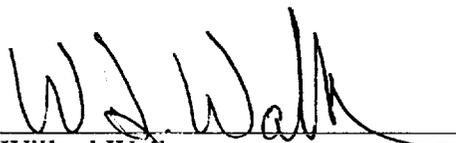
One Copy
Internal E-Mail

Mr. Scott Simmons
Office of Hazardous Materials Enforcement
Southern Region Office
Atlanta, GA 30303

One Copy (without enclosures)
Internal E-Mail

U.S. DOT Dockets
U.S. Department of Transportation
400 Seventh Street, S.W., RM PL-401
Washington D.C. 20590

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Willard Walker